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No. 86-50

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM JANKLOW,

Petitioner,

v.

NEWSWEEK, INC.,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner William Janklow ("Jankiow"), presently serving as Governor of South Dakota, brought this defamation action against Newsweek, Inc. ("Newsweek"). Janklow claims that certain "defamatory suggestions" or implications concerning his motivation in performing his public duties arose from the facts stated in a Newsweek article (or from Newsweek's omission to state additional facts) and that such unstated "suggestions" or "implications" are actionable. The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, held that the "suggestions" or "implications" claimed by Janklow were non-actionable opinions and that the article in question contained no actionable, false statement of fact or omission.

The questions presented are:

1. Whether the Eighth Circuit properly held that the purportedly defamatory "suggestions" in the article were non-actionable opinions? and

2. Whether the Eighth Circuit properly held, in the particular circumstances of this case, that Newsweek's statements did not imply the existence of any unstated defamatory facts concerning Janklow?

The third question presented in the Petition was not raised below and is not properly raised here. *See*, *infra*, Point IV.

List of Parties

Petitioner, an individual, is the Governor of South Dakota.

Respondent, Newsweek, Inc., is a New York corporation and is a wholly owned subsidiary of The Washington Post Company, a Delaware corporation. Other subsidiaries and affiliates of The Washington Post Company (exclusive of wholly owned subsidiaries) are:

Bear Island Paper Company
Bear Island Timberlands Company
Bowater Mersey Paper Company, Limited
Cablecom of Fargo Limited Partnership
Cowles Media Company
Detroit Cellular Telephone Company
Florida Cellular Telephone Company
International Herald Tribune, S.A.
Los Angeles Times / Washington Post News Service, Inc.
Sandoval County Cable Television Company
SportsChannel Associates
SportsChannel Chicago Associates
SportsChannel New England Limited Partnership
SportsChannel Prism Associates
Washington / Baltimore Cellular Telephone Company

Newsweek, Inc. has no subsidiaries other than wholly owned subsidiaries.

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WILLIAM JANKLOW,

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NEWSWEEK, INC.,

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BRIEF IN OPPOSITION

Newsweek, Inc. ("Newsweek") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the *en banc* decision of the Eighth Circuit Court of Appeals in this cause. The decision is reported at 788 F.2d 1300 and reprinted in the petition (hereinafter "Pet.") at A-61 *et seq.*

STATEMENT OF THE CASE

In 1967, a 15-year-old Indian girl, Jancita Eagle Deer, accused the petitioner, William Janklow ("Janklow"), of rape. Despite his denials and the absence of any criminal charges, this accusation has repeatedly surfaced and is now a part of South Dakota's political history.[1]

1 The truth of the girl's charges has never been tested in this or any other judicial proceeding. The courts below nevertheless found that Newsweek accurately reported the manner in which the underlying charges were made and considered, finding it unnecessary to determine their truth or falsity to determine the matters presented by Newsweek's motion for summary judgment.

In February 1983, Newsweek published a news article ("the Article," reprinted at Pet. A-1 *et seq.*) focusing on the current activities of Dennis Banks, an Indian activist and fugitive from South Dakota justice. As background, the Article set out a brief summary of a notorious dispute between Janklow and Banks. As the Article states, "In 1973 [Banks] was involved in a riot at the Custer, S.D., courthouse during which several policemen were injured." (Pet. A-2–A-3). In October of the following year, Banks pressed the girl's earlier rape charges against Janklow in a tribal court proceeding. In 1975, Janklow—who was elected South Dakota's attorney general in November 1974 despite the notoriety which attended the proceedings in the tribal court—appeared personally to handle the trial of criminal charges pending against Banks since shortly after the 1973 riots.

One paragraph from the Article recounting this history became the centerpiece of Janklow's libel claim against Newsweek. It reads (Pet. A-3):

> Along the way, Banks made a dangerous enemy—William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow—who had won his election despite messy publicity—was prosecuting Banks. And his case—based on the 1973 Custer riot—was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

Janklow's original theory of this case was that this passage falsely accused him of rape. Following extensive discovery, the District Court heard a summary judgment motion by Newsweek and rejected this claim, holding that the Article was not susceptible of such a reading. (Pet. A-14). The court concluded that Janklow failed to adduce sufficient evidence that Newsweek's report was false in any material respect to raise a triable issue of fact. (Pet. A-12). That ruling was unanimously affirmed by the three-judge panel (759 F.2d 644, 649; Pet. A-30); it was not reconsidered *en banc* (788 F.2d 1300, 1301, n. 2; Pet. A-63, n. 2) and has not been raised here.

These holdings dismissed a multitude of Janklow's previous claims and pared his case down to his present single theory that the Article contains additional "defamatory suggestions" (*see* Pet. "Questions Presented") that he misused his public offices "to retaliate" against Banks for bringing the tribal court rape charges. In rejecting Janklow's claim, the District Court said (Pet. A-14):

> The tenor of the article is not that plaintiff is a rapist in defendant's opinion. The inference that may reasonably be drawn is that plaintiff is pursuing Banks so vigorously because Banks instigated the tribal court action based on the old rape claim. The issue is whether the expression of such an opinion constitutes libel, and I conclude it does not.

The original Eighth Circuit panel disagreed with that conclusion, finding that "the meaning to which the article is susceptible—that Janklow prosecuted Banks for revenge" (759 F.2d at 652, Pet. A-43) is a statement of fact, not an opinion protected by the First Amendment.

The Eighth Circuit agreed to hear this issue *en banc*, in effect vacating the decision of the panel. After hearing, it affirmed the District Court. For the following reasons, that determination raises no issue which requires further review by this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

QUESTION 1

I.

PETITIONER HAS NOT IDENTIFIED ANY MATERIAL CONFLICT AMONG THE CIRCUITS.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) this Court stated, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." This view has continued to be reaffirmed in the decisions of this Court. *Bose Corporation v. Consumers Union*, 466 U.S. 485, 504 (1984). *See also Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). The rule is entirely consistent with other holdings which underscore the point that a libel action cannot be maintained unless it is based on a statement which readers will understand to be a false assertion of *fact*. *Letter Carriers v. Austin, supra*, 418 U.S. at 283-84; *Greenbelt Cooperative Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Although Janklow implicitly criticizes the *Gertz* rule as *dicta* (Pet. 9), his petition offers no reason in principle for abandoning it.

Since *Gertz*, a number of federal Courts of Appeal have carefully considered the distinction between statements of fact and statements of opinion. It has been recognized—both before and after *Gertz*—that the distinction presents practical difficulties. But, contrary to Janklow's characterization of those decisions as conflicting (Pet. 11 *et seq.*), the federal decisions are in substantial harmony, both as to their expression of legal principles and as to their application of the law to the facts in particular cases. The *en banc* decision in this case relied upon (*see* 788 F.2d at 1302, n. 3; Pet. A-65-A-66, n. 3) and is fully in accord with the decisions of all of the other circuits which have considered the question in any detail. *See especially Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en*

banc), *cert. denied*, 105 S.Ct. 2662 (1985); *Mr. Chow v. Ste. Jour Azur*, 759 F.2d 219 (2d Cir. 1985); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 131 (1985); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980); *accord Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717 (11th Cir. 1985), *reh'g denied*, 783 F.2d 205 (1986).

Each of these decisions emphasizes that the distinction between fact and opinion is sometimes difficult and not susceptible of easy determination by mechanical rules. Thus, the courts must ultimately base their determinations on the "totality of circumstances." To that end, each decision sets out "guidelines" to assist the lower courts in determining whether a particular statement is fact or opinion. To the extent there are differences among the courts in the factors to be considered as "guidelines," they are properly seen as differences of emphasis and articulation, not conflicting theories.

II.

NONE OF THE ISSUES PRESENTED BY PETITIONER PRESENTS A SUFFICIENT LIKELIHOOD OF REVERSAL TO WARRANT REVIEW BY THIS COURT.

The actual facts of this case present scant likelihood that it could be reversed because of an error in the Eighth Circuit's consideration of the fact-opinion distinction. Thus, even if Janklow had presented cogent arguments that the abstract questions he raises require the attention of this Court, the actual facts of this case do not justify review here.

Significantly, although Janklow's petition surveys the cases—old and new, state and federal—relating to the fact-opinion distinction, he makes no effort to point out how any actual conflict between the decision below and these other decisions would advance his case. That he did not do so undercuts the thrust of the petition much more eloquently than reams of abstract discussion.

In this connection, Newsweek relies principally on the *en banc* decision below. The rationale set forth in that decision amply supports the conclusion that the "defamatory suggestions" alleged by Janklow were protected opinion, not actionable fact. 788 F.2d at 1302-05; Pet. A-64-A-76. To that discussion, we add the following brief points:

1. In the usual case involving a fact-opinion distinction, the court is asked to examine a "statement" made by the defendant, not the conclusions derived by readers from those statements. Here, there is no such "statement" by Newsweek, only an allegedly "defamatory suggestion" (*see* Pet. "Questions Presented") that one or more readers may have found in Newsweek's statements.[2]

2. To the extent that any reader might find such allegedly "defamatory suggestions" concerning Janklow's motivation in the Article, they might equally well be found from the facts which Janklow concedes to be true as from those he now alleges are false.

As the Eighth Circuit pointed out (788 F.2d at 1304, 1306; Pet. A-72, A-80), Janklow's present allegations of "falsity" in the allegedly "defamatory suggestions" turn on a semantic quibble about the sentence which says "Eight months later Janklow . . . . *was prosecuting* Banks." [Emphasis supplied.] The factual cornerstone of his claim is that this sentence was understood to mean that Janklow "commenced" or "initiated"

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2 In fact, the only direct statement in the Article concerning Janklow's motivation is built around a quotation from Janklow himself (Pet. A-4, A-5):

> "All the little people who followed Dennis Banks that day in Custer faced justice," Janklow says. "One of the key things people like Dennis Banks complain about is the dual standards of justice in this country—and if we allow him to go free because he has friends like Jerry Brown and Marlon Brando, we would be playing right into the accusations of duality." Determined that Banks face justice too, he took his case to the California Supreme Court, which ruled that the matter [of Banks' extradition to South Dakota] was entirely Brown's decision.

the prosecution after the tribal court proceeding. Janklow asserts this is false since Banks' prosecution was actually commenced by a 1973 indictment, although it did not come to trial until 1975.

For at least two reasons, the Eighth Circuit properly rejected this essential contention:

a. Janklow's reading of the sentence in question is strained and unnatural. Newsweek properly used the past imperfect tense—"was prosecuting"—to denote continuing action. In so doing, the sentence was literally accurate and fully in keeping with the facts.

The context also helped to clarify the pertinent chronology. Although the Article did not specify the date of Banks' indictment, it did affirmatively state that Banks "was involved in a riot" in 1973 and that the case prosecuted by Janklow was "based on the 1973 Custer riot," thus accurately reciting the factual antecedents to the trial and, incidentally, lending credence to the validity of the underlying riot charges.

b. Those who would have found Janklow's "commencement" of a prosecution in these circumstances to be reprehensible are equally likely to question Janklow's continued personal participation in the most important and visible part of Banks' prosecution, including the trial, after the tribal court proceeding had finished.[3] Simply stated, the purported "falsity" on which the claim stands or falls is not material to the gist or sting of the alleged libel.[4]

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3 "It is of utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office." ABA Project on Standards of Criminal Justice, *Standards Relating to the Prosecution Function and Defense Function*, Approved Draft, 1971, ¶ 1.2 Commentary, *cited with approval in State v. Kindvall*, 86 S.D. 91, 97, 191 N.W.2d 289, 293 (1971). "It is the duty of an attorney and counselor at law not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest." SDCL 16-18-16.

4 For the same two reasons, Janklow's allegations that Newsweek knew of this chronology and that it knew Banks was attempting to "derail" Janklow's election (*see* Pet. 20, 23) are beside the point.

3. Even if Newsweek had affirmatively stated that Janklow's prosecution of Banks was improperly motivated by a quest for revenge, such a statement should be protected as "opinion" for the following reasons in addition to those cogently set out in the opinion of the *en banc* panel:[5]

a. Few topics are closer to the core of the First Amendment—and therefore deserving of latitude—than discussions concerning the motivations of public officials in conducting public business. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) ("Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). The facts underlying the Article involve (i) the administration of the criminal justice system by elected public officials, (ii) the treatment of expressions of grievances by minority groups, and (iii) the relations among the states and the federal government concerning extradition and other aspects of the criminal justice system, all extremely important public issues in which Janklow had an intimate role. As the Article itself recounts, these topics had been widely aired in highly colorful rhetoric long before Newsweek published its Article. In such circumstances—no less than the case of labor disputes, *Letter Carriers v. Austin, supra*, and zoning disputes,

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5 The fact that Newsweek made no such statement serves to distinguish this case from *Ollman v. Evans, supra*, where the most troubling statement was (750 F.2d at 993):

> Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. "Ollman has no status within the profession, but is a pure and simple activist," he said.

As Judge Scalia pointed out in his dissent (750 F.2d at 1037), this conclusion concerning Professor Ollman's status in his profession derives its "sting" from its attribution to an apparently impartial and sympathetic expert.

In the present case, just the reverse is true—even on Janklow's analysis of the case—since the purportedly defamatory conclusion is not a statement of Newsweek or some purportedly impartial third party, but—at most—a conclusion of the reader himself.

Greenbelt Cooperative Pub. Ass'n v. Bresler, supra—the average reader expects colorful and opinionated reporting.

b. At the same time, few topics are more slippery—and therefore less susceptible of verification through judicial proceedings or otherwise—than the motivation of public officials. It comes as no surprise that such motives are frequently mixed and often masked. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). For this reason, this Court has strenuously guarded against attempting to resolve such questions in a judicial forum. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies"). *See also Spalding v. Vilas*, 161 U.S. 483, 498 (1896) ("personal motives cannot be imputed to duly authorized official conduct.") *cited with approval in Barr v. Matteo*, 360 U.S. 564, 570 (1959).

This very point is one of the foundation stones of modern libel law. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) *quoting Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C.Cir. 1942), *cert. denied*, 317 U.S. 678 (1942) ("Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate."). *See also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977), *cert. denied*, 434 U.S. 969 (1977) ("inquiry into motivation [of a public official's official acts] is within the scope of absolute privilege").

c. Moreover, few individuals have less need for, and less claim to, protection against criticism than a person in Janklow's position. During the pendency of this action, he was Governor of his state and a candidate for the United States Senate; earlier, he was Attorney General and a special prosecu-

tor. Such men are presumptively "men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947). That presumption is fully borne out in Janklow's life; he is an enthusiastic and able rhetoritician, notoriously able "to give as good as he gets."[6]

4. Finally, the constitutional basis on which the Eighth Circuit properly relied for its decision is firmly rooted in common law antecedents. Prior to any indication that the First Amendment protected statements of opinion, the courts of this country granted wide latitude to the discussion of public affairs under the "fair comment" privilege. No part of that privilege was broader than that accorded to criticism of the acts of public officials and candidates for office. *See Restatement of Torts*, § 607, comments c and d (1938).[7] South Da-

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6 In mid-1982, after Gov. Brown of California refused to extradite Banks to South Dakota, Janklow announced that he had permitted 93 South Dakota felons to go free on condition that they leave for California, saying that he had devised the release program to upset Gov. Brown (reprinted in the record below at Tab 31, page 10):

> "I was needling the guy," he said. "It's a personal thing between me and Brown. It's a personal thing between me and Dennis Banks' way of avoiding justice. If Jerry Brown wants just Dennis Banks the criminal, he can have our other criminals, too."

Prior to commencement of this action, Janklow recognized that allegations concerning his motivations were simply part of this highly-charged political rhetoric. During a telephone conversation with a Newsweek reporter following publication of the Article, he complained vociferously about the accuracy of the report concerning the rape allegations, but also admitted (Clerk's Record at 293):

> But I mean, I don't even argue with the accuracy of the remainder of the story, and if Banks wants to call me a Custer reborn, anti-Indian, a racist redneck, look, those are political statements. I can live with that.

7 In pertinent part, Comment c reads:

> c. The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications of those who hold such offices. Those who hold such offices and those who offer themselves as candidates therefor, by doing so subject their public acts to honest criticism even though it be extravagant and unjustified. To make

kota, in particular, adheres to a minority rule which applies the "fair comment" privilege to statements of fact, as well as those of opinion, in circumstances such as those present here. *See Egan v. Dotson*, 36 S.D. 459, 476, 155 N.W. 783, 787 (1915). *Accord McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920). Under this rule of state law, the "fair comment" privilege protects false statements of fact and opinion unless plaintiff snows that defendant:

> knowing the same to be false, or in reckless disregard of its truth or falsity, intentionally made use of the privilege which is accorded to all newspapers to discuss the moral character and the qualifications and fitness of candidates for office, as a cover or a means or the occasion for publishing false statements.

Egan v. Dotson, supra, 36 S.D. at 475, 480, 155 N.W. at 787, 789. Since no such showing has been—or can be—made here, the common law of South Dakota provides an additional ground for the decision below.

* * *

For the foregoing reasons, the matter presented by this case lies at the core of what ought to be protected as opinion. There is thus a scant likelihood of reversal of the decision below and no reason for review of that decision.

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the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential information. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby.

QUESTION 2

III.

THE SECOND QUESTION RAISED BY PETITIONER MISSTATES THE *EN BANC* HOLDING AND FAILS TO RAISE ANY ISSUE WORTHY OF REVIEW.

In his second "Question Presented," Janklow attempts to make an issue where none exists, that is, "whether defamatory opinions which are based upon falsely stated facts, or upon implications created by omissions of crucial facts, are protected." Pet. at Questions Presented. In Part III of its *en banc* decision (788 F.2d at 1305-06; Pet. A-77-A-80), the Eighth Circuit accepted Janklow's legal theory on this score, but rejected his conclusion on the ground that the facts in this case do not support such a claim. In particular, it held that (788 F.2d at 1306; Pet. A-80):

> The implication Janklow complains of here comes from semantic ambiguity, not from false statements made by Newsweek. As we said above, this Court will not make editorial judgments about specific word choices in order to portray a plaintiff in the best possible light, particularly where the "sting" of the implication—that Janklow acted vengefully towards Banks—is still present when the full chronology is laid out.

Nor is there any basis for arguing that Newsweek's Article contained a statement of opinion which implied the existence of defamatory facts. *Cf. Restatement (Second) of Torts*, § 566 (1977).

The most that can be said for Janklow's second Question Presented is that he disagrees with the Eighth Circuit's application of the law to the facts of this case. No real conflict is presented (*cf.* Rule 17.1(a)) and there is no issue worthy of review here.

QUESTION 3

IV.

THE THIRD QUESTION RAISED BY PETITIONER WAS NOT RAISED OR DECIDED BELOW, MISSTATES THE PRIOR HOLDING OF THIS COURT AND DOES NOT RAISE ANY ISSUE WORTHY OF REVIEW.

In essence, Janklow now argues—although he has not previously done so—that a claim for libel may not be dismissed on the ground that the statements involved are opinion unless the court also rules on the state of mind of the publisher with respect to the truth or falsity of that opinion.

The petition should be denied in this respect simply because the issue was not raised below.

Moreover, Janklow's argument is based on an apparent misreading of *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 n.30 (1964). There, the Court observed that both the newly recognized constitutional privilege and the common law "fair comment" privilege are "defeasible" if the plaintiff proves "actual malice." In doing so, the Court said that "the defense of fair comment must be afforded for honest expressions of opinion *based upon privileged, as well as true, statements of fact*. Both defenses are, of course, defeasible if the public official proves actual malice, as was not done here." [Emphasis supplied.] In both instances, the Court focused on statements of fact—including those which were false, but nevertheless privileged—not on the possibility that the privilege could be lost for a "false" or "reckless" comment or opinion based on truthful or privileged facts.[8] Reading footnote 30 in this fashion, as it should properly be read, makes it entirely consistent with the later rule announced in *Gertz*. So read, it is

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8 Judge Robinson's dissenting opinion in *Ollman v. Evans*, *supra*, 750 F.2d at 1025, n.83 carefully considers this point and is in accord with the view expressed in the text.

clear that Janklow's claim must fall, since he never reached the threshold: Newsweek's motion for summary judgment required him to show a triable issue of material "falsity" of those facts (Fed. R. Civ. P. 56(e)), which he failed to do.

V.

DENIAL OF THE PETITION WOULD SERVE THE PUBLIC INTEREST.

This cause is one of a series of actions brought by Janklow to suppress public discussion of the rape allegations.

1. Recently, a state court dismissed Janklow's claims against three local booksellers who sold copies of Peter Matthiessen's book, *In the Spirit of Crazy Horse* (Viking Press 1983), which discusses the rape allegations in some detail. *Janklow v. Viking Press et al.*, (Civ. 83-1385, Circuit Court, Second Judicial Circuit) (June 25, 1986) (not officially reported).

2. Additional claims in the same action are pending against the author and publisher of that book. *Janklow v. Viking Press*, 378 N.W.2d. 875 (S.D. 1985).

3. During discovery in this action, it came to light that Janklow threatened to bring defamation proceedings against the Holmes family in Aberdeen, South Dakota, for displaying a poster containing the rape charges (among other things) in the second floor hallway of their home. (Janklow Dep. at 53-54).

4. In the mid-1970's, Janklow also brought actions against a Bureau of Indian Affairs investigator and another newspaper reporter and publisher for their reports of the same incident. (*Id.* at 49-52). These claims were dismissed prior to trial.

The net effect of all this actual and threatened litigation has necessarily been to chill discussion of this incident through intimidation of the press and the public.

At the same time, Janklow has held the highest office in his state for two full terms and aspired to the United States Senate.

There is no doubt that charges such as those in the tribal court proceeding are material to voters in determining Janklow's fitness for office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). Similarly, Janklow's response to the tribal court proceeding—flaunting the order to show cause it issued by failing to appear (759 F.2d at 647, n.3; Pet. A-25, n.3)—and his official handling of the Banks case are at the core of the First Amendment concerns. *Garrison v. Louisiana*, *supra*.

The continued pendency of this action—based, at most, on a semantic quibble about the detailed chronology of the events in question—would simply add judicial sanction to this chilling effect. For this reason alone, it is in the public interest to deny the petition.

CONCLUSION

For the reasons assigned, Newsweek respectfully requests this Court to deny the petition for a writ of certiorari in this cause.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that he is a member of the bar of this Court and counsel of record in the within action and that this day he served the original and forty copies of the foregoing BRIEF IN OPPOSITION upon the Clerk of the United States Supreme Court and three copies thereof each upon all counsel of record by depositing such copies in the United States mail, postage prepaid, at New York, N.Y., in envelopes addressed to such persons at the addresses designated by them for that purpose, as follows:

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Dated: New York, N.Y.
September ____, 1986.

Stephen Froling

Sworn to before me this ____
day of September, 1986

Notary Public